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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WILLIAM P. BARR,
ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner
v.
CATHOLIC SOCIAL SERVICES, INC., *et al.*

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner
v.
LEAGUE OF LATIN AMERICAN CITIZENS, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession. Its over 370,000 members come from every state and territory and the District of Columbia. Since its inception over one hundred years ago, the ABA has taken an active and direct interest in the efficient and equitable

administration of justice and conducted a wide variety of programs to improve the justice system.

The ABA also has a long-standing interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration laws. Numerous policy statements adopted by the ABA over the years have uniformly encouraged immigration policies which assure the consistent application of due process and access to administrative and judicial review.

Consistent with these principles and to help implement them, the ABA's policy-making House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee is made up of representatives of nine ABA entities with specialized knowledged of various areas relevant to immigration issues. Also in 1983, the ABA House of Delegates approved a Resolution that "those unlawful aliens who are now here be dealt with realistically and humanely and that those who are otherwise law-abiding be accorded a legal status." In the month that President Reagan signed into law the 1986 immigration act, the ABA established a national program to assist in the implementation of the legalization provisions, including the organization of numerous *pro bono* immigration representation efforts and the training of volunteer attorneys from the private bar to counsel legalization applicants and represent them on appeal. These interests led the ABA to submit an *amicus curiae* brief in the 1990 term in *McNary v. HRC*, 111 S.Ct. 888 (1991), favoring an interpretation of the agricultural workers' legalization (SAW) statute as permitting district court jurisdiction to hear broad-based regulatory challenges.

The ABA appears as *amicus curiae* in these cases because the question presented has serious implications for the allocation of the resources of the federal judiciary and access of parties to an effective forum for judicial review of administrative agency action. The ABA has received the consents of all parties in these cases.

SUMMARY OF ARGUMENT

As part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, Congress provided for the legalization of those immigrants who had entered the United States unlawfully prior to January 1, 1982, and had resided continuously in the country in an unlawful status since then. In order to be eligible, aliens had to meet not only the requirements of continuous residence but also had to have been physically present in the United States since November 6, 1986, the date IRCA became effective. However, Congress created an exception to this requirement for aliens who failed to maintain continuous physical presence because of "brief, casual, and innocent absences from the United States," 8 U.S.C. § 1255a(a)(3)(B). Shortly after IRCA was passed, but before any alien had yet applied for amnesty, the INS issued rules interpreting the continuous residence and physical presence requirements so as to disqualify a large number of aliens who had traveled briefly outside of the United States. On this appeal the government erroneously contends that the federal district courts were wholly precluded from hearing challenges to these rules brought by organizational as well as individual plaintiffs by 8 U.S.C. § 1255a(f)(1) which provides that "[t]here shall be judicial review of such a denial [of an application for adjustment of status] only in the judicial review of an order of deportation under [§ 106 of the INA]." *Id.* § 1255a(f).

As demonstrated under Point I, the government is in error because these actions did not seek "judicial review of a determination respecting an application for adjustment of status" at all, and thus do not come within the bar of § 1255a(f). Only last term, this Court held that the nearly identical provisions of IRCA at 8 U.S.C. § 1160(e)(1)-(3) which provided for judicial review of determinations under IRCA's farmworker amnesty program applied "*only* to review of denials of individual . . . applications," *McNary v. Haitian Refugee Center, Inc.*,

498 U.S. ——, 111 S.Ct. 888, 897 (1991) (emphasis added) rather "than a group of decisions or a practice or procedure employed in making decisions." *Id.*

Similarly, the plain language and legislative history of the statute demonstrate that Section 1255a(f) was intended to apply only to individual appeals of a "determination" on an amnesty application and not to agency rulemaking or claims asserting system-wide defects in the process by which determinations are made. Single-tier judicial review provisions, of the kind the petitioners envisage, that vest jurisdiction in a court of appeals are traditionally viewed as a means of achieving efficiency by eliminating a layer of review in cases where the trial court would do little more than duplicate either the agency factfinding or the judicial appellate function. No such duplication is involved in these cases, where the administrative record that would be developed in the proceedings before the agency would not inform the appellate court's consideration of the issues presented by a rule challenge. That inquiry would necessarily focus on the information available to the agency at the time the regulation was adopted, not on the facts of any individual case.

The government's interpretation of Section 1255a(f) would also have the effect of requiring amnesty applicants, often proceeding without counsel, to assert due process procedural and substantive claims on a case-by-case basis. Insofar as they may raise agency-wide practice and policy issues affecting those similarly situated in thousands of cases, these cases would be far more efficiently dealt with as class actions. As argued under Point II, the government's own statistics demonstrate the burdens on the judiciary that would result are unmitigated by any benefits to the parties and do not warrant judicial legislation to read into a statute that which is neither express nor intended.

ARGUMENT

I. AGENCY RULE-MAKING IS NOT "A DETERMINATION RESPECTING AN APPLICATION" AND THEREFORE THE JUDICIAL PRECLUSION PROVISION OF 8 U.S.C. § 1255a(f) DOES NOT APPLY TO THESE CASES.

Either the INS policy directives and interpretative rules issued prior to the beginning of the application period constitute "a determination respecting an application" or they do not.[1] If they do not constitute "a determination respecting an application," then the judicial preclusion provision of 8 U.S.C. § 1255a(f) simply does not apply in these cases. This Court's decision in *McNary v. Haitian Refugee Center*, 111 S.Ct. 888 (1991), construing the nearly identical judicial review provision at 8 U.S.C. 1160(e), appears to answer this question decisively:

> [W]e hold that § 210(e) applies *only* to review of denials of individual . . . applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired . . . 111 S.Ct. at 897 (emphasis added).

In other words, "a determination respecting an application" refers only to the determination to grant or deny *a particular application*. A regulation is not a single act which decides the merits of an individual applicant's case; rather it is a rule or practice which is employed in making decisions in many applicants' cases.

The government's insistence that a rule is "a determination respecting an application" is contrary to well es-

[1] We respectfully refer the Court to the Petitioners' Appendix ("Pet. App."), the Respondents' Brief in Opposition, and the briefs of the parties for the full text of Section 1255a(f) and other relevant statutory provisions, and for detailed statements of the background of this case.

tablished principles of administrative law. The Administrative Procedure Act clearly differentiates a "rule" under 5 U.S.C. § 551(4) and an "adjudication" under 5 U.S.C. § 551(7). In fact, agency rule-making is specifically excluded from the definition of adjudication under the APA. 5 U.S.C. § 551(6) and (7).[2] To read "a determination respecting an application" as encompassing both rule-making and adjudication would lead to the anomalous result that the administrative appellate authority mandated by Section 1255a(f)(3)(A) would have the power to entertain facial challenges to the regulations themselves. Certainly Congress did not envision that the INS Legalization Appeals Unit (LAU) would undertake the administrative review of the Attorney General's regulations promulgated after notice and comment. Yet that is the ironic consequence of the government's position.[3]

[2] Petitioners' own regulations make it clear that the words "a determination respecting an application" refer to the process of adjudication, not to rule-making. 8 C.F.R. § 245a.1(e) defines the term "to make a determination" as obtaining and reviewing all information required to *adjudicate* an application for the benefit sought and making a decision thereon." (emphasis added).

[3] The government's reliance on the word "respecting" to justify its broad reading of "a determination respecting an application" is inconsistent with Congress' interchangeable use of that phrase with "the determination on the application" in Section 1255a(f)(3). Paragraph (3)(A) establishes administrative appellate review of "a determination described in paragraph (1)," which is the paragraph containing the term "a determination *respecting* an application for adjustment of status." *Id.* Section 1255a(f)(3)(A), (f)(1) (emphasis added). Paragraph (3)(B) states that "[s]uch administrative appellate review"—signalling by the word "such" that the review is of a "determination *respecting* an application"—"shall be based on the administrative record established at the time of the determination *on* the application." *Id.* Section 1255a(f)(3)(B) (emphasis added). In short, Congress provided for review of a determination "respecting" an application, based on the record established "on" the application. Clearly, the "determination" in (f)(3)(B) is the same determination referred to in (f)(3)(A). This conclusion is underscored by the use of the definite article in (3)(B): '*the* determination on *the* application." *Id.* (emphasis added). The juxtaposition of the two phrases, coupled with use of the word "the" to indicate that the same determination and the same application are being referred to, compel the conclusion that Congress saw no difference between a determination "respecting" an application and a determination "on" an application.

The statutory scheme also supports the view that only review of individual applications, not rule making, is limited by Section 1255a(f). Section 1255a(f) follows immediately after several subsections dealing with adjudication of individual applications. The general rule-making authority under which the challenged INS regulations were issued appeared in the following subsection, which has no review provisions in it. 8 U.S.C. § 1255a(g).

Moreover, as this Court has noted with respect to the nearly identical review provisions found in the legalization program for agricultural workers, "the 'abuse of discretion' standard of judicial review . . . would make no sense" if the Reform Act were to be read as requiring constitutional and statutory challenges to INS procedures to be subject to its specialized review provision:

> Although the abuse-of-discretion standard is appropriate for judicial review of an administrative adjudication of the facts of an individual application for SAW status, such a standard does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts. The language of § 210(e)(3)(B) thus lends substantial credence to the conclusion that the Reform Act's review provision does not apply to challenges to INS's practices and procedures in administering the SAW program.

McNary v. HRC, supra 111 S.Ct. at 897. The same argument applies with equal force to the language of Section 1255a(f)(4)(B).

Thus, the plain language of Section 1255a(f) places the statute squarely within the class of jurisdiction-preclusion provisions that are traditionally viewed as warranted only in circumstances where district court fact-finding would unnecessarily duplicate an adequate ad-

ministrative record—circumstances that are not present either in "pattern and practice" cases where district court factfinding is essential or statutory challenges to agency rule-making where the administrative record of the particular case is essentially irrelevant. *See McNary supra*, 111 S. Ct. at 898-899.

The United States Code is replete with similar provisions, all of which have in common the definition of a specific agency order based on a record that it would be wasteful to duplicate in a district court.[4] The traditional rationales for this kind of restriction on judicial review are conservation of judicial resources and efficiency of administrative process. Vesting jurisdiction to review agency orders in the court of appeals under these statutes is simply a means of eliminating one layer of review in situations where a trial court would do little more than duplicate either the agency factfinding or judicial appellate function:

> [A]dministrative agencies, particularly in discharging quasi-judicial adjudicating functions, perform much the same functions with respect to the courts of appeals as do district courts. Evidence is heard, a record is prepared and sifted, issues are identified and resolved. Frequently, indeed, the issues are subject to the further testing of intra-agency review on appeal from an administrative law judge or hearing examiner, and resolution by a collegial body. The questions open for judicial review are commonly questions of law or review of the record for substantial evidence to support the administrative decision—matters as to which a district court would play the same

[4] A partial illustrative list is provided in 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3941 (1977), which cites approximately 60 such provisions, ranging from orders of the Administrator of the Environmental Protection Agency with respect to the registration of poisons and pesticides, 7 U.S.C. §§ 135b(d), 136n(4), to actions of the United States Commissioner of Education in acting on state plans for community services program grants, 20 U.S.C. § 1008.

> role as a court of appeals. Review initially by a district court, and then by a court of appeals, would impose added burdens of delay on the administrative process, and of delay and expense on the parties.

16 C. Wright, A Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3940, at 302 (1977).

The burdens imposed by two-tier judicial review of administrative determinations—as distinguished from two-tier review of challenges to the process by which such determinations are made—are described in *Polcover v. Secretary of the Treasury*, 477 F.2d 1233 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). There, district court review of a claim of wrongful discharge of a federal employee was limited to the record made by the Civil Service Commission, and the district court was required to apply the same standards of review as the court of appeals. The court of appeals criticized the

> [d]uplication, delay, expense and despair for the employee-litigant [that] are inherent in such a system. The interposition of the district court serves . . . no viable purpose [where] the record before us is identical to that [which] had already been made at the administrative level and presented to] the district court.

477 F.2d at 1227.

Such would be the response were plaintiffs here simply seeking to arrogate to the district court the narrow role ascribed to the court of appeals in Section 1255a(f)—if, for example, the district court were asked to review the application of the INS regulations to the facts of a particular case. At issue on this appeal, however, is an entirely different claim: whether the district court has jurisdiction to entertain challenges to the rules and procedures under which whole classes of determinations are made.

This Court has consistently recognized the distinction, for the purpose of jurisdiction preclusion, between appeals from a documented administrative decision and challenges to the process by which the determination is made. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986) (statute that limits review of "any determination . . . of . . . the amount of benefits . . . simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than *determinations* themselves"); *Christian v. New York State Dep't of Labor*, 414 U.S. 614, 622 (1974) ("the fact that the . . . agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination:); *see also Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977); *Fusari v. Steinberg*, 419 U.S. 379 (1975), *California Dep't of Human Resources v. Java*, 402 U.S. 121 (1971). In *UAW v. Brock*, 477 U.S. 274 (1986), this Court rejected the same argument echoed here by petitioners—that the limitation on review of "*a determination*. . . with respect to entitlement to program benefits" contained in § 2311(d) "irrevocably commits to state processes *all claims* relating to TRA entitlements." *Brock* at 284 (emphasis added). Unlike the situation in *Heckler v. Ringer*, 466 U.S. 602 (1984), where the claims of the plaintiffs, although couched in procedural language, were "at bottom, a claim they should be paid for their BCBR surgery," the injunctive relief ordered by the district courts at issue here does not dictate the outcome of any particular case.[5] Because the INS

[5] The distinction between *Heckler v. Ringer*, the case heavily relied upon by petitioners here, and these cases is obvious. In *Ringer*, the Court held that Ringer's cause of action—namely, that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act—constituted "a claim arising under" the Medicare Act within the meaning of the judicial preclusion provision. 466 U.S. at 621. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under the Act." Far from providing an analogy for how IRCA should be construed, the broad terminology employed in 42 U.S.C. § 405(h), expressly providing that no action shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under [subchapter A] of the Medicare Act, illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

McNary, supra, also pointed out that had Congress intended the judicial review provisions of IRCA to encompass challenges to INS procedures and practices, it could have easily used broader statutory language such as the general grant of district court jurisdiction under Title II of the INA at 8 U.S.C. § 1329 ("all causes . . . arising under any of the provisions") or 38 U.S.C. § 211(a) which governs review of veterans' benefits claims ("all questions of law and fact"). 111 S.Ct. at 897.

[6] *Bowen* was originally remanded to the lower court for further reconsideration in light of *Heckler v. Ringer*, 469 U.S. 807 (1984). On remand, the court of appeals specifically addressed the question of whether the Michigan Academy of Physicians, a non-profit corporation, was *entitled* to challenge a Medicare regulation in district court since § 405(g) administrative review was not available to it, as it was to individual claimants. The court of appeals concluded that *Ringer* did not proscribe challenges to the Medicare Act where the challenge was made by a party other than a claimant for benefits. *Michigan Academy of Family Physicians v. Blue Cross and Blue Shield of Michigan*, 757 F.2d 91, 94 (6th Cir. 1985). The decision was subsequently affirmed by this Court. 476 U.S. 667, 669 (1986).

must readjudicate applications which were based on invalid regulations, it is not thereby obliged to rule in any particular applicant's favor.

Even if the judicial preclusion provisions of IRCA were as broad as those in *Ringer*, the presence of the organizational plaintiffs in these cases makes *Ringer* inapposite. *Bowen v. Michigan Academy of Physicians*, *supra*, found that the review provisions at issue in *Ringer* simply do not apply to an organization of physicians challenging a regulation in district court. 476 U.S. at 667.[6] The same logic applies to the organizational plaintiffs here who (like the Michigan Academy of Physicians) will never have claims capable of being processed through the stand-

ard statutory review procedures. Just as the Michigan Academy was not challenging an "amount determination," the organizations bringing these lawsuits are not seeking review of "a determination respecting an application."

The government's interpretation that agency rulemaking constitutes "a determination respecting an application" would consign each individual applicant to a drawn-out and ultimately fruitless administrative appeals process solely for the purpose of preserving the applicant's statutory claims should his or her case ever reach the court of appeals in the context of a review of an order of deportation. Then, and only then, after the case had been considered by the LAU, the immigration judge and the Board of Immigration Appeals, could the applicant raise the validity of the underlying regulations. Even then, the potential for review of such claims as are raised here is largely illusory. Because judicial review is limited under the statute to the administrative record established at the time of the review by the LAU, Section 1255a(f)(4)(B), the limitations on "the record" would prevent a hearing of such claims or their effective remedy for all those similarly affected.

The "record" would generally consist of no more than a completed application form, a report of medical examination, any evidence by way of documents or affidavits that the applicant meets the residence requirements, and notes if any, taken on a form worksheet by an INS interviewer at the time of an initial application—all related in any given case to a single legalization applicant. *See* 8 C.F.R. §§ 245a.2(d), 245a.(e)(2) and (3). This "administrative record" stands in stark contrast to the type of administrative record normally considered by the courts in determining the validity of an agency's regulations. In deciding *McNary v. HRC, supra*, the majority opinion recognized that, in the absence of district court factfinding, the administrative record in individual determinations could not have addressed the pattern of INS' allegedly discriminatory practices at issue there:

> As the American Bar Association as amicus points out, statutes that provide for only a single level of judicial review in the courts of appeals "are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in 'pattern and practice' cases where district court factfinding is essential [given the inadequate administrative record]." Brief for American Bar Association as Amicus Curiae 7. It therefore seems plain to us, as it did to the District Court and the Court of Appeals, that restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.

111 S. Ct. at 898-899. Contrary to the implication in the government's brief, these cases do not involve deference to "agency expertise." Neither the LAU and the immigration judge, nor the BIA, has any authority to consider the merits of the applicants' statutory claims.[7]

Equally daunting is the prospect that, if not allowed to pursue their statutory claims in district court, many

[7] *See Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1332 n.7 (D.C. Cir. 1989) *vacated and remanded for further consideration in light of McNary*, 111 S.Ct. 1068 (1991) ("[f]acial challenges to the regulation [in a proceeding before the LAU] are not permitted"); *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989) ("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations . . . any more than there is authority to consider constitutional challenges to the laws we administer.") *See also*, 8 C.F.R. § 103.3(a)(3)(iii). Moreover, it is the judiciary, not the administrative agency, which is the final authority on issues of statutory construction and congressional intent. *See e.g. Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, n. 9 (1984).

individual applicants would never be able, as a practical matter, to obtain meaningful judicial review of their objections to the INS regulations.[8] Because there is no provision for direct judicial review of the denial of legalization status unless the alien is later apprehended and placed in deportation, most aliens can ensure themselves review in the courts of appeals only if they voluntarily surrender themselves for deportation. As this Court noted in *McNary*, "that price is tantamount to a complete denial of judicial review for most undocumented aliens." 111 S.Ct. at 898. *See also Rusk v. Cort*, 369 U.S. 367 (1962)[9] Even if the alien were to present himself for arrest and deportation solely to obtain review of his statutory claims,

[8] Of course, under the petitioners' approach, the aliens who were turned away or otherwise discouraged from filing because the challenged INS regulations made them ineligible would never be able to obtain *any* review of the underlying policy because there could never be "a determination" as to them. Petitioners' approach would also preclude judicial review of claims by legalization applicants who were denied statutory employment authorizaiton during the six to seven monthly period *prior to the start of the application period* on the ground that, under an allegedly unlawful INS legalization policy, they could not establish a *prima facie* or nonfrivolous claim for legalization. *See* 8 U.S.C. § 1255a(e)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a nonfrivolous case of eligibility to have his status adjusted . . . (but for the fact that he may not apply for such adjustment until the beginning of such period) . . ."). Under petitioners' construction, the wholesale denial of employment authorization to such aliens during the pre-application period could *never* be remedied, despite the obvious irreparable injury, because no legalization application had yet been denied.

[9] In *Rusk*, this Court granted independent federal review to a person contesting his loss of citizenship notwithstanding the review procedures set out in 8 U.S.C. § 1503(b) and (c). Because these latter provisions required a person living abroad to "travel thousands of miles, be arrested and go to jail in order to attack an administrative finding that he is not a citizen," 369 U.S. at 376, this Court found that the provisions did not preclude the broad remedial provisions of the APA.

as the government suggests, the INS could refuse, at its unfettered and unreviewable discretion, to institute the deportation proceedings which are a prerequisite to review under the statute.[10]

Under petitioners' theory, the district director, who alone may invoke deportation proceedings, would have the ultimate power to place INS altogether beyond the constraints of judicial review, no matter how unlawful its actions may be, simply by choosing not to institute deportation proceedings against those affected.[11] Nothing in the language of the statute warrants a result so completely at odds with this Court's strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. *See also, Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). This presumption not only originates in the Administrative Procedure Act, *Abbott Laboratories*, 387 U.S. at 140, but in the very

[10] Nothing in the INA or its regulations provides a way for an alien to trigger the initiation of deportation proceedings against himself. Generally, every proceeding to determine the deportability of an alien is commenced by the filing of an order to show cause with the Office of the Immigration Judge. *See* 8 C.F.R. § 242.1 (providing for the issuance of an order to show cause by one of a list of enumerated officials). The decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not reviewed by either the immigration judge or the BIA. *Matter of Ramirez-Sanchez*, 17 I&N Doc. 503 (BIA 1980); *Matter of Mercid*, 14 I&N Doc. 644 (BIA 1974), *aff'd mem.*, 514 F.2d 1070 (5th Cir. 1975); *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977).

[11] It is not contested on this appeal that the INS interpretation of IRCA's "brief, casual and innocent" provision and "continuous residence" requirement were erroneous. Thus, the record in these cases itself provides a proper basis to determine that deference to "agency expertise" would be misplaced.

foundation of the Court's power to maintain judicial review. *Bowen*, 476 U.S. at 670 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835)). The petitioners' expansive reading of "respecting" in the administrative and judicial review provision of Section 1255a(f) ignores this strong presumption favoring judicial review and would require the statute to be applied in a manner inconsistent with its language, structure and purpose, its legislative history and the class-nature of the actions before this Court.

II. DIVESTING DISTRICT COURT'S OF FEDERAL QUESTION JURISDICTION OVER CHALLENGES TO AGENCY RULE-MAKING DEPRIVES THE PARTIES AND THE JUDICIARY OF THE EFFICIENCIES OF CLASS ACTION LITIGATION.

The government's interpretation of Section 1255a(f) would preclude amnesty applicants from proceeding as a class under Fed. R. Civ. P. 23 ("Rule 23"). The government's position would thus require amnesty applicants who allege injury from system-wide agency abuses to seek relief on a case-by-case basis and an inadequate record in the federal appellate courts in the context of individual deportation orders. A sense of the overwhelming burden this would impose on the parties and courts is provided by the INS' own statistics.

According to INS statistics, as of December 1, 1991, 3,033,179 applications for temporary resident status had been filed under IRCA, of which 216,018 applications had been denied and 155,109 remained pending. Statistics Division, Office of Strategic Planning, U.S. Immigration and Naturalization Service, *Provisional Legalization Application Statistics*, December 1, 1991. While the potential workload for the INS, the BIA and the courts of appeal which these numbers entail is enormous, the numbers would have been truly staggering had the district courts not properly exercised their jurisdiction to address

system-wide abuses in INS's administration of the legalization programs.[12]

INS statistics show that during the period 1984 through 1990, federal circuit courts managed to review an average of 345 orders of deportation per year under Section 106, leaving an average of 849 cases pending at each year-end. *1990 Statistical Yearbook of the Immigration and Naturalization Service*, 186. During this period the actual number of cases reviewed actually decreased from 494 in 1984 to 264 in 1990. *Id.* There is no question that hun-

[12] *See e.g. HRC v. Nelson*, 694 F.Supp. 864 (S.D. Fla. 1988), *aff'd sub nom. McNary v. HRC*, 498 U.S. ——, 111 S.Ct. 888 (1991) (enjoining unlawful INS procedures for adjudicating SAW applications); *Ayuda, Inc. v. Meese*, 687 F.Supp. 650 and 700 F.Supp. 49 (D.D.C. 1988), *rev'd* 880 F.2d 1325, 948 F.2d 742 (D.C. Cir. 1991) *petition for cert. pending*, No. 91-1924 (enjoining INS regulation that denied eligibility under "known to the government" standard of 8 U.S.C. § 1255a(a)(2)(B) to persons whose unlawful status was known to agencies other than the INS or whose unlawful status resulted from failure to file periodic address reporting forms); *Farzad v. Chandler*, 670 F.Supp. 690 (N.D. Tex. 1987) (same re known to other agencies); *Immigrant Assistance Project v. INS*, 709 F.Supp. 998 and 717 F.Supp. 1444 (W.D. Wash. 1989) (same re address reporting forms); *Zambrano v. INS*, No. 8-88-455 (E.D. Cal. 1988), *aff'd* —— F.2d. —— (9th Cir. August 19, 1992) (enjoining INS regulation that denied eligibility to aliens if an immediate family member received "public cash assistance"); *Vargas v. Meese*, 682 F.Supp. 591 (D.D.C. 1987) (enjoining INS regulation requiring SAW applicants filing within the United States to have entered country before June 26, 1987); *see also Perales v. Thornburgh*, 967 F.2d 798 (2nd Cir. 1992) (district court had jurisdiction over challenge to INS "public charge" regulation); *Doe v. Nelson*, 703 F.Supp. 713 (N.D. Ill. 1988) (court has jurisdiction over challenge to INS regulation barring legalization applications unless they are filed within 30 days after start of application period); *United Farmworkers v. INS*, No. 87-1964-LKK/JFM (E.D. Cal. 1988) (settlement of challenge to INS procedures for adjudicating SAW applications in parallel case to *McNary v. HRC* for Northern and Western regions of INS). In many of these cases, the INS either entered into settlement agreements as to one or all of the claims asserted or did not appeal the merits as to one or more such claims.

dreds of thousands of aliens have legalization claims affected by the INS policies at issue in these cases and the cases cited *supra* at p. 17 n. 12. If all of the INS denials based on regulations which the district courts have determined to be unlawful were channeled into case-by-case review, appeals to the circuit courts of only a small fraction of those denials would flood the courts with many times the number of all cases that were decided over the seven year period of 1984-1990.

The inefficiencies inherent in this prospect are not mitigated by any benefit to the parties. To the contrary, the failure of legalization applicants to obtain relief on a case-by-case basis is in striking contrast to the success achieved in class actions. "The LAU remanded about ninety percent of the appeals it received in 1989, mostly because of court orders [in district court class actions] requiring the INS to correct deficiencies in adjudicating SAW applications," 2 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 47.02(8)(i), at 47-36 & n.267 (rev. ed. 1990). Indeed, not only does the LAU lack the authority to rule on challenges to INS regulations, but our review of circuit court opinions does not reveal a single instance to date in which a legalization applicant successfully obtained circuit court review of INS regulations through an individual appeal under section 1255a(f).[13]

The statutory claims that the government would relegate under Section 1255a(f) to case-by-case review are also directly analogous to claims asserted in *Califano v. Yamasaki*, 442 U.S. 682 (1979). There, this Court rejected government objections to certification of a class of plaintiffs challenging certain procedures under the Social Security Acts as violative of due process. In *Yamasaki*, as in the present case,

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[13] Nearly four years after the application period ended, we found only one reported case in which an applicant was successful in reversing a LAU decision through an individual appeal under Section 1255a(f). *See Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990).

> [t]he issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class . . . . It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting many [applicants] to be litigated in an economical fashion. . . .

442 U.S. at 701.

As set forth in *Yamasaki*, this Court requires "a clear expression of Congressional intent" to "indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action is otherwise permissible." *Id.* at 700. The legislative history of IRCA reveals no such intent. To the contrary, Congress rejected a version containing a judicial review provision that explicitly barred class actions.[14] "Few princi-

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[14] The rejected Senate version provided that there would be "no judicial review (by class action or otherwise) of a decision or determination under this section" and further provided that an alien denied adjustment of status under this legalization program "may not raise a claim concerning such adjustment in any proceedings of the United States or any State involving the status of such alien . . ." S. 1200, 99th Cong., 2d Sess. § 202(f)(1985). Since "this section" in that bill included a provision authorizing the Attorney General to promulgate regulations necessary for the legalization program, *Id.* § 202(a)(1), the Senate restriction would have precluded review of rule-making. Indeed, the Senate report accompanying S. 1200 stated that the preclusion attached to "a decision or determination made with respect to *the legalization program*." S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added). By contrast, the House Committee Report stated that the language ultimately adopted by Congress provided for limited administrative and judicial review of *denials of applications for legalization*. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 74 (1986). Thus, when the Senate agreed to the House language which, on its face, limited only the judicial review procedure for determinations *respecting an application*, it should be clear that it was receding from a broadly worded preclusion to a much narrower one.

ples of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). The legislative history reflects, moreover, that Congress sought to "ensure that fair administrative reviews are conducted by the INS and to provide for the complete considerations of all possible evidence to determine legalization" without "unduly burden[ing] to Government or the applicants with an excessively complex process," 130 Cong. Rec. 17229 (daily ed. June 20, 1984) (Remarks of Rep. Mineta).[15] These concerns are consonant with a limitation on review on individual applications without *sub silentio* displacing the policies embodied in Rule 23 and embraced by this Court—and with the realities of how issues are raised and preserved in "pattern and practice" cases.

The most frequently recognized benefit of the class action is avoidance of duplicative suits and the concomitant increased court efficiency in the administration of litigation. The Rules Advisory Committee in commenting

[15] Moreover, Congress created IRCA's judicial review provisions against a well-established background of existing case law holding that 8 U.S.C. § 1105a does not preclude broad-based statutory and constitutional challenges brought as class actions. *See, Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1232-33 (5th Cir. Unit B 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986). When adopting a new law incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), and to adopt the interpretation when it incorporates the prior law without change, *Id.*

The very fact that Congress implemented judicial review of legalization denials through the pre-existing statutory structure of 8 U.S.C. § 1105a—without further restriction or of change to that section—establishes that Congress did not seek to alter legislatively the case law on § 1105a with respect to IRCA.

on the 1966 amendments to Fed. R. Civ. P. 23 stressed the judicial economies and procedural convenience of class actions: "[the Rule] encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

This Court, as well, has recognized that class certification advances "the efficiency and economy of litigation which is a principal purpose of the procedure." *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982). *See also American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) ("A federal class action is . . . a truly representative suit designed to avoid, rather than encourage, unnecessary filings of repetitious papers and motions.")

Class actions provide significant benefits to defendants as well as plaintiffs:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, [and] the provision of a convenient and economical means for disposing of similar lawsuits . . .

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963).

Commentators also recognize the particular utility of the class action procedure in civil rights litigation:

> Groups which find themselves unable to achieve their stated objectives through the ballot frequently turn to the Courts . . . [They help make] possible the distinctive contribution of a minority group to the ideas and beliefs of our society [and provide an] avenue open to a minority to petition for the redress of grievances.

Note, Development in the Law, Class Actions, 89 Harv. L. Rev. 1318 (1976). Judge Weinstein has observed that "[t]he impact of class actions in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member." Weinstein, *Some Reflections on the 'Abusiveness' of Class Actions*, 58 F.R.D. 299 (1973) (remarks before the Fifth Judicial Circuit Symposium on Class Actions).

Judge Weinstein's remarks are particularly apt in the context of IRCA's programs. Nearly four years after the application period ended, only a handful of applications have reached the courts of appeals. Assuming, for the sake of argument, that an individual applicant were able to obtain meaningful relief in the court of appeals by means of the review set forth in Section 1255a(f), at this juncture a decision invalidating an INS regulation would have no prospective effect. Each applicant affected by the regulation in question would still have to pursue his or her case in the court of appeals.[16]

It is also significant that, as of August 15, 1992, only 9.8 percent of all amnesty applicants were represented by counsel, while 69.6 percent proceeded *pro se*. The remaining 20.5 percent were not represented by legal counsel, *pro bono* or otherwise, but by temporary agencies created by voluntary groups called Qualified Designated Entities ("QDE"). Letter of Michael D. Hoefer, Chief

[16] In *Ayuda, Inc. v. Thornburgh, supra*, the District of Columbia Circuit noted that the INS would not be obliged to acquiesce in one circuit's interpretation of a statutory term under IRCA in other circuits that had not decided the question and might not even be required as a matter of law to acquiesce in an unfavorable ruling when future cases arose in the same circuit court of appeals. 880 F.2d at 1330-31, n.4. The Ninth Circuit has also suggested that the INS has the right to nonacquiesce intracircuit. *See Castillo-Felix v. INS*, 601 F.2d 459, 467 (9th Cir. 1979). *See generally* Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 Yale L. & Pol'y Rev. 430 (1991).

Demographic Statistics Branch Statistics Division, to Attorney Bruce Goldstein dated September 2, 1992 (Annexed hereto as Appendix A). Many QDE's no longer exist or are unavailable to assist in processing individual appeals. This reinforces another benefit of the class action which is clearly relevant here: an "effective utilization of finite sources of legal help." 1 H. Newberg, *Newberg on Class Actions*, § 5.13, at 451.

An interpretation of Section 1255a(f) that divests district courts of jurisdiction to hear broad-based regulatory challenges thus unnecessarily burdens all concerned—plaintiffs, the government, the judiciary, and scarce *pro bono* counsel—by withholding the clear benefits of class certification that is otherwise appropriate under Rule 23.[17]

[17] Many of the same reasons which support the conclusion that the districts courts properly assumed jurisdiction over these cases, also provide ample support for the proposition that those courts had the power to grant effective relief by tolling the application period deadline for aliens who were thwarted or discouraged from filing applications by the Attorney General's unlawful IRCA regulations. We do not think this Court could have intended that its decision in *INS v. Pangilinan*, 486 U.S. 875 (1988) would leave these plaintiffs without a remedy simply because the district courts were unable to decide the merits of plaintiffs' challenge to the rules until the end of the 12-month statutory application period.

While an individual claim for legalization may properly be denied on the basis that the applicant did not file on time, Congress's creation of a limited application period cannot reasonably have been intended to preclude federal courts from issuing an appropriate remedial order after finding that the INS regulations violated IRCA and that the unlawful regulations had the direct effect of denying applicants any reasonable opportuniy to exercise their statutory rights in a timely fashion. As this Court has said, "once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("Congress intends the executive to obey its statutory commands and . . . expects the courts to grant relief when an executive agency violates such a command.") Tolling the application

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the decisions of the Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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period deadline is fully consistent with the overall congressional purpose to encourage the maximum number of undocumented aliens "to emerge from the shadows" and apply for legalization.

APPENDIX

APPENDIX

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

425 Eye Street N.W.
Washington, D.C. 20536
September 2, 1992

Bruce Goldstein
Farmworker Justice Fund, Inc.
2001 S Street, N.W., Suite 210
Washington, DC 20009

Dear Mr. Goldstein:

This is in response to your request of August 17, regarding the number of pre-82 legalization applicants who used the services of a lawyer. I have updated information since I last spoke with Ms. Poplawski so I am also including information for Special Agricultural Workers in the table listed below.

Legalization Applicants by Type of Representation
As of August 15, 1992

Representation	Pre-82	SAW
Total	1,763,434	1,277,514
Self	1,184,747	932,377
Attorney	222,784	49,964
Qualified Designated Entity (QDE)	340,442	284,130
Attorney and QDE	15,461	11,043

Source: Legalization Application Processing System.

If I can be of further assistance or if you have any questions please contact me at (202) 376-3066.

Sincerely,

/s/ Michael D. Hoefer
MICHAEL D. HOEFER
Chief
Demographic Statistics Branch
Statistics Division